UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| FRANKLIN O. RAMEL,<br><br>Plaintiff,<br><br>v.<br><br>JO ANNE B. BARNHART,<br>Commissioner of Social Security<br><br>Defendant. | CASE NO. C05-1913-RSL<br><br><br><br>REPORT AND RECOMMENDATION<br>RE: SOCIAL SECURITY<br>DISABILITY APPEAL |

Plaintiff Franklin O. Ramel proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Supplemental Security Income (SSI) benefits and Disability Insurance (DI) benefits after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, it is recommended that this matter be REMANDED for further administrative proceedings.

## FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1960. [1] He did not complete high school, but obtained a

[1] Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

GED and a certification for plumbing and pipe fitting. Plaintiff previously worked as a van driver, custodian, and plumber.

Plaintiff filed an application for SSI and DI benefits on July 19, 2002, alleging disability beginning March 1, 1999 due to an anxiety disorder, attention deficit disorder, back pain, weakened right leg, cognitive and memory problems, limited range of motion in his neck, and chest pain. (AR 111-14, 414-17.) Plaintiff was insured for DI benefits through December 2000.

Plaintiff's applications were denied initially and on reconsideration, and he timely requested a hearing. On October 5, 2004, ALJ John Bauer held a hearing, taking testimony from plaintiff and vocational expert Richard King. (AR 27-81.) On December 1, 2004, ALJ Bauer issued a decision finding plaintiff not disabled. (AR 17-26.)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on September 23, 2005, making the ALJ's decision the final decision of the Commissioner. (AR 5-7). Plaintiff appealed this final decision of the Commissioner to this Court.

The Court heard oral argument in this matter on July 19, 2006.

## JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

## DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity during the period at issue. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's mild

attention deficit disorder, adjustment disorder with anxiety, mixed personality disorder, and mild degenerative disc disease severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments did not meet or equal the criteria for any listed impairments. If a claimant's impairments do not meet or equal a listing, the Commissioner must assess RFC and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff capable of lifting twenty pounds occasionally and ten pounds frequently, with a moderate limitation in concentration, persistence, and pace, and only able to work with occasional contact with the public or coworkers. The ALJ concluded plaintiff was unable to perform his past relevant work. If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. The ALJ found plaintiff capable of making an adjustment to work existing in significant numbers in the national economy, including as a food prep worker or file clerk.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues that the ALJ improperly rejected the opinions of treating physicians, failed to perform the proper analysis of his pain, improperly assessed his credibility, erred in disregarding the lay witness statement of his sister without comment, and failed to meet his step five burden. Plaintiff requests remand for an award of benefits or, in the alternative, for further administrative proceedings. The Commissioner argues that the ALJ's decision is supported by substantial evidence and should be affirmed. The parties also dispute the relevance of an April 2005 evaluation from one of plaintiff's treating physicians

The Court has discretion to remand for further proceedings or to award benefits. *See Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of benefits where "the record has been fully developed and further administrative proceedings would serve no useful purpose." *McCartey v. Massanari* 298 F.3d 1072, 1076 (9th Cir. 2002).

> Such a circumstance arises when: (1) the ALJ has failed to provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he considered the claimant's evidence.
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> *Id.* at 1076-77. In this case, the undersigned recommends that this matter be remanded for further administrative proceedings.

Physicians' Opinions

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted by another physician, a treating or examining physician's opinion may be rejected only for "'clear and convincing'" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).

Where contradicted, a treating or examining physician's opinion may not be rejected without "'specific and legitimate reasons' supported by substantial evidence in the record for so doing." *Id*. at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). Where the opinion of the treating physician is contradicted, and the non-treating physician's opinion is based on independent clinical findings that differ from those of the treating physician, the opinion of the non-treating physician may itself constitute substantial evidence. *See Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995). It is the sole province of the ALJ to resolve this conflict. *Id*.

Plaintiff argues that the ALJ failed to properly assess the opinions of his treating physicians – Drs. Nina Greenblatt and Elizabeth Noll. He maintains that the ALJ relied solely on the opinions of state agency, non-examining physicians – Drs. Gerald Peterson and Stephen Goldberg, that the opinions of Drs. Greenblatt and Noll were uncontradicted, and that the ALJ could only reject these opinions "by providing specific and legitimate reasons that are clear and convincing." (Dkt. 13 at 12.)[2] Plaintiff maintains the ALJ simply parroted the findings of the state agency physicians, making no reference to his problems with panic, tearfulness, or profuse sweating.

A. Dr. Nina Greenblatt

Plaintiff points to an August 2004 evaluation by Dr. Greenblatt. (*See* AR 349-52.) In that report, Dr. Greenblatt referred plaintiff to physical therapy for back pain, which she noted she had first become aware of on that date, and further noted her belief that plaintiff is "severely functionally limited due to his mental health issues." (AR 352.) Plaintiff posits that the ALJ apparently rejected this report, simply mentioning it in his decision without indicating why it had

[2] The latter contention conflates the two tests for considering uncontradicted and contradicted opinions.

been disregarded. (*See* AR 21.) Plaintiff also points to other referrals made by Dr. Greenblatt as reflecting the seriousness with which she took his various complaints.

The Commissioner denies that the ALJ relied solely on the opinions of Drs. Peterson and Goldberg, asserting that he also relied on the opinions of Dr. Greenblatt. The Commissioner notes that, as concluded by Dr. Greenblatt, the ALJ found plaintiff limited to light work, that is, able to lift twenty pounds occasionally and ten pounds frequently. (AR 21, 23.) The Commissioner also asserts that the ALJ's acknowledgment of plaintiff's severe mental impairments and finding of a moderate limitation in concentration, persistence, and pace and limitation of only occasional contact with coworkers and the public was consistent with Dr. Greenblatt's opinions.

In reply, plaintiff clarifies that Dr. Greenblatt treated plaintiff primarily for physical complaints, referring him to Dr. Noll for his mental health treatment. Plaintiff asserts that he primarily suffers from a severe mental illness and that the ALJ failed to recognize the weight and importance of Dr. Greenblatt's reports or provide a basis for rejecting her opinions.

The ALJ did not simply rely on the opinions of Drs. Peterson and Goldberg. Instead, he found as follows:

> The State Agency physicians felt that the claimant was limited to light work. This is the capacity assessment by the claimant's treating physician. While I feel that this is probably more restrictive than the claimant's activities indicate, I will accept this assessment. I generally agree with the State Agency physicians concerning claimant's mental limitations, but note that the record does support that the claimant has frequently reported problems with anger, so he probably should not work closely with others or the general public.

(AR 23.) The ALJ subsequently concluded that plaintiff retained the RFC to lift twenty pounds occasionally and ten pounds frequently, and assessed a moderate limitation in concentration, persistence, and pace and only occasional contact with the public and coworkers. (*Id.*)

Accordingly, as indicated by the Commissioner, the ALJ assessed a physical RFC consistent with Dr. Greenblatt's August 2004 evaluation. Moreover, if anything, plaintiff downplays the relevance of Dr. Greenblatt's opinions as to his mental problems, noting that she treated him primarily for physical issues. Dr. Greenblatt's unelaborated statement that plaintiff was "severely functionally limited due to his mental health issues" is, therefore, not particularly compelling. (AR 352.) For these reasons, plaintiff fails to demonstrate error in the ALJ's consideration of the opinions of Dr. Greenblatt.

B. Dr. Elizabeth Noll

Plaintiff states that, while referencing her treatment records, the ALJ gave no indication as to whether he accepted or rejected the opinions of Dr. Noll. He asserts that it does not appear the ALJ adopted Dr. Noll's diagnosis of probable attention deficit disorder, adjustment disorder with anxiety, and mixed personality disorder with schizoid and avoidant traits. (*See* AR 302.)

Plaintiff also points to an April 2005 report from Dr. Noll submitted to the Appeals Council, after the ALJ's December 2004 decision. ( *See* AR 436-44.) In that report, Dr. Noll found plaintiff met the criteria for Listing 12.04, affective disorders. (AR 443.) In an attached letter, Dr. Noll stated as follows:

> Mr. Ramel suffers with Adult Attention Deficit Hyperactivity Disorder, recurrent Major Depression, a mixed Personality Disorder, and has a history of a closed head injury. He suffers with episodes of anxiety and panic attacks, but does not meet the criterion for Panic Disorder.
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> Mr. Ramel's depression and anxiety symptoms have not responded well to serotonin-type antidepressants, but he is more functional on the antidepressant Wellbutrin, the mood stabilizer Topamax, and an anti-anxiety medication when needed. He did not respond well to standard medications for Attention Deficit Hyperactivity Disorder.
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> Despite some modest improvements in mood and energy level, Mr. Ramel continues

> to suffer with a very low frustration tolerance and stress tolerance, which prevent him from being able to work for pay, and to have meaningful interpersonal relationships.

(AR 436.) Plaintiff states that, because the Commissioner declined review of the April 2005 report, it cannot be ascertained what weight it would have been given.

The Commissioner responds that the ALJ did, in fact, accept Dr. Noll's diagnoses of attention deficit disorder, adjustment disorder with anxiety, and mixed personality disorder – finding all of these conditions severe at step two. (AR 21.) With respect to Dr. Noll's April 2005 report, the Commissioner notes that the Appeals Council found it did not meet the criteria for a grant of review. (*See* AR 5-6 (considering additional evidence, but denying request for review.)) Pointing to sovereign immunity and applicable laws and regulations, the Commissioner asserts that, because the Appeals Council denied review, the Court may only review the final decision of the Commissioner – the decision of the ALJ.*See* 42 U.S.C. § 405(g) (allowing for judicial review of "any final decision of the Commissioner of Social Security made after a hearing"); *United States v. Idaho*, 508 U.S. 1, 6-7 (1993) (waivers of federal sovereign immunity must be made by specific statutory language); 20 C.F.R. § 422.210(a) ("A claimant may obtain judicial review of a decision by an administrative law judge if the Appeals Council has denied the claimant's request for review, or of a decision by the Appeals Council when that is the final decision of the Commissioner."); and *Sims v. Apfel*, 530 U.S. 103, 106-07 (2000) ("SSA regulations provide that, if the Appeals Council grants review of a claim, then the decision that the Council issues is the Commissioner's final decision. But if, as here, the Council denies the request for review, the ALJ's opinion becomes the final decision.") The Commissioner maintains that, because the Court may only review final decisions, it may not review the Appeals Council's decision to deny review, including the Appeals

Council's conclusion here that Dr. Noll's opinions did not provide a basis for a grant of review.

The Commissioner adds that this Court may only review evidence from Dr. Noll pursuant to sentence six of 42 U.S.C. § 405(g): "The court . . . may at any time order additional evidence to be taken before the Commissioner . . . , but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding[.]" The Commissioner asserts that plaintiff fails to establish good cause. Specifically, she states that plaintiff's failure to solicit the evidence from Dr. Noll – who began treating plaintiff in January 2002 – prior to the ALJ's decision, bars its admission now. *See Clem v. Sullivan*, 894 F.2d 328, 332-33 (9th Cir. 1990) ("The claimant must establish good cause for not seeking the expert's opinion prior to the denial of his claim.") The Commissioner further argues that Dr. Noll's April 2005 opinions are not material to the period at issue, describing, for example, a statement made in the present tense. (AR 436 (stating plaintiff has "a very low frustration and stress tolerance, which prevent him from being able to work for pay, and to have meaningful relationships.")) and *Mayes v. Massanari*, 276 F.3d 453, 462 (9th Cir. 2001) ("To be material under section 405(g), the new evidence must bear 'directly and substantially on the matter in dispute.' Mayes must additionally demonstrate that there is a 'reasonable possibility' that the new evidence would have changed the outcome of the administrative hearing.") (cited sources omitted).

Plaintiff responds that neither sovereign immunity, nor "good cause/materiality" apply when the Appeals Council has, as in this case, already made the new evidence part of the record. (*See* AR 5-8 (noting additional evidence was considered and stating: "The Appeals Council has received additional evidence [including medical records from Dr. Noll] which it is making part of

the record.")) and *Harman v. Apfel*, 211 F.3d 1172, 1180-81 (9th Cir. 2000) ("We properly may consider the additional materials because the Appeals Council addressed them in the context of denying Appellant's request for review."; remanding for further consideration of the evidence, including that submitted to the Appeals Council, without mention of whether such evidence must be new, material, or previously omitted for good cause); *Ramirez v. Shalala*, 8 F.3d 1449, 1451-52 (9th Cir. 1993) ("Although the ALJ's decision became the Secretary's final ruling when the Appeals Council declined to review it, the government does not contend that the Appeals Council should not have considered the additional report submitted after the hearing, or that we should not consider it on appeal. Moreover, although the Appeals Council 'declined to review' the decision of the ALJ, it reached this ruling after considering the case on the merits; examining the entire record, including the additional material; and concluding that the ALJ's decision was proper and that the additional material failed to 'provide a basis for changing the hearing decision.' For these reasons, we consider on appeal both the ALJ's decision and the additional material submitted to the Appeals Council.") *See also* 42 U.S.C. § 405(g) (sentence four states: "The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.") and 20 C.F.R. § 404.970(b) ("If new and material evidence is submitted, the Appeals Council shall consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision.") He distinguishes the cases cited by the Commissioner as relating to "new evidence" or evidence found not to be relevant, *see Clem*, 894 F.2d at 332 and *Mayes*, 262 F.3d at 972, and notes that neither case involved any discussion of sovereign immunity.

The ALJ's decision reflects consideration of Dr. Noll's opinions. As noted by the Commissioner, the ALJ accepted Dr. Noll's diagnoses of attention deficit disorder, adjustment disorder with anxiety, and mixed personality disorder, designating these conditions severe at step two. (AR 21.) The ALJ also, as reflected above, took note of plaintiff's reported problems with anger, adding a limitation on working closely with others or the public onto the limitations assessed by Drs. Peterson and Goldberg, and found a moderate deficiency in concentration, persistence, and pace. (AR 22-23.) For these reasons, plaintiff fails to demonstrate error in the ALJ's consideration of the opinions of Dr. Noll.

The ALJ could not, of course, consider the April 2005 report from Dr. Noll submitted only to the Appeals Council. As argued by plaintiff, Ninth Circuit case law clearly supports the proposition that evidence submitted to the Appeals Council becomes part of the administrative record for the purposes of this Court's review. *See Harman*, 211 F.3d at 1180-81; *Ramirez*, 8 F.3d at 1451-52. *See also Gomez v. Chater* , 74 F.3d 967, 971 (9th Cir. 1996) ("Although the Appeals Council affirmed the decision of the ALJ denying benefits to Gomez, [evidence submitted to the Appeals Council] is part of the record on review to this court."); *Barbato v. Commissioner of Soc. Sec. Admin.*, 923 F. Supp. 1273, 1275 (C.D. Cal. 1996) ("Where, as here, the Appeals Council considered additional evidence but denied review, the additional evidence becomes part of the administrative record for purposes of the Court's analysis.") The parties dispute, however, whether that evidence is reviewed pursuant to sentence four or sentence six of 42 U.S.C. § 405(g). This dispute presents a recurring issue in cases coming before this Court.

During oral argument, and in previous cases, the Commissioner pointed to decisions from circuit courts supporting their position that evidence submitted to the Appeals Council should not

be considered by the district court, unless within the confines of sentence six of § 405(g), requiring good cause and materiality as described above. *Matthews v. Apfel*, 239 F.3d 589, 591-94 (3d Cir. 2001); *Falge v. Apfel*, 150 F.3d 1320, 1322-23 (11th Cir. 1998); and *Cotten v. Sullivan*, 2 F.3d 692, 695-96 (6th Cir. 1993). *See also Mills v. Apfel*, 244 F.3d 1, 4-6 (1st Cir. 2001) (district court may only review evidence presented to the ALJ, but may review Appeals Council's refusal to review where it gives an egregiously mistaken ground for the denial); *Eads v. Secretary of the Dep't of Health and Human Servs.*, 983 F.3d 815, 817-18 (7th Cir. 1993) (district court may not consider evidence first presented to the Appeals Council, but can review Appeals Council's denial of review for legal error). However, the Commissioner ignores the circuit court decisions reaching the contrary conclusion. *See Higginbotham v. Barnhart*, 405 F.3d 332, 335-37 (5th Cir. 2005); *Perez v. Chater*, 77 F.3d 41, 45 (2d Cir. 1996); *O'Dell v. Shalala*, 44 F.3d 855, 859 (10th Cir. 1994); *Nelson v. Sullivan*, 966 F.2d 363, 366 (8th Cir. 1992); *Wilkins v. Secretary, Dep't of Health and Human Servs.*, 953 F.2d 93, 96 (8th Cir. 1992). Nor does the Commissioner acknowledge that courts directly addressing this circuit split – including one relied on by the Commissioner – put the Ninth Circuit squarely within the latter group of cases. *See, e.g.*, *Matthews*, 239 F.3d at 590; *Perez*, 77 F.3d at 44-45. Likewise, this Court previously held that "evidence that was presented to the Appeals Council should be evaluated pursuant to 'sentence four' of 42 U.S.C. § 405(g)." *Anderson v. Barnhart* , No. C02-2174L, slip op. at 1-3 (W.D. Wash. Nov. 21, 2003) (citing *Harman*, 211 F.3d at 1180-81).

The Commissioner's position, therefore, appears to rest upon the fact that the Ninth Circuit decisions allowing consideration of Appeals Council evidence do not explicitly address whether or not good cause and materiality is required. As previously noted by the Commissioner,

in *Mayes*, the Ninth Circuit stated: "Because the parties [in *Ramirez*] agreed that the new evidence submitted for the first time to the Appeals Council should be considered, *Ramirez* does not address whether submissions to the Appeals Council are or are not subject to the good cause requirement." 276 F.3d at 461 n.3 (internal citation omitted). However, the *Mayes* decision did not address the additional reason cited in *Ramirez* for considering Appeals Council evidence:

> Moreover, although the Appeals Council 'declined to review' the decision of the ALJ, it reached this ruling after considering the case on the merits; examining the entire record, including the additional material; and concluding that the ALJ's decision was proper and that the additional material failed to 'provide a basis for changing the hearing decision. For these reasons, we consider on appeal both the ALJ's decision and the additional material submitted to the Appeals Council.

8 F.3d at 1452. Nor did the Ninth Circuit in *Mayes* mention or discuss its previous decisions in *Gomez*, 74 F.3d at 971, and *Harman*, 211 F.3d at 1180, wherein there was no indication the parties agreed that Appeals Council evidence should be considered. Finally, the Ninth Circuit in *Mayes* also stated that it "need not decide whether good cause is required for submission of new evidence to the Appeals Council[.]" 276 F.3d at 461 n.3.

Moreover, given the absence of any discussion or consideration of good cause and materiality, the Ninth Circuit decisions in *Ramirez* and *Harman* can be read to implicitly allow for consideration of Appeals Council evidence pursuant to sentence four of § 405(g). Like other circuit courts more directly addressing this disputed issue, it appears that in finding Appeals Council evidence to form a part of the record on review, the Ninth Circuit did not find the sentence six factors applicable. *See*, *e.g.*, *Nelson*, 966 F.2d at 366 n.5 ("[O]nce the evidence is submitted to the Appeals Council it becomes part of the record, thus it would not make sense to require Nelson to present good cause for failing to make it part of a prior proceeding's record.")

Also, while defendants insist that the Court lacks jurisdiction to review the Appeals Council's denial of review – and that the Ninth Circuit has not ruled on this issue – it is relevant to note that the Ninth Circuit clearly assumed such jurisdiction in *Ramirez*. *See* 8 F.3d at 1454-55 (finding that the Appeals Council erred in failing to find that the plaintiff met the requirements of a listing). While this Court may not be bound by such an assumption, *see, e.g.*, *Sorenson v. Mink*, 239 F.3d 1140, 1149 (9th Cir. 2001) ("[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions."); *Estate of Magnin v. Commissioner*, 184 F.3d 1074, 1077 (9th Cir. 1999) ("When a case assumes a point without discussion, the case does not bind future panels."), the Commissioner fails to identify any binding precedential authority upon which this Court could rely to support her position.

Accordingly, given all of the above, the undersigned considers the evidence submitted to the Appeals Council pursuant to sentence four of § 405(g). However, for the reasons described below, even taking Dr. Noll's April 2005 report into consideration, substantial evidence supports the ALJ's decision.

The ALJ's recitation of the evidence before him, including records from Dr. Noll, reflects consideration of all of the symptoms discussed in Dr. Noll's April 2005 report, including, *inter alia*, anxiety, panic attacks, depression, attention deficit, and anger. (*See* AR 19-21 and AR 436.) The ALJ nonetheless found plaintiff capable of working, while assessing moderate limitations in social functioning and in concentration, persistence, and pace, and finding plaintiff should not work closely with others or the public. (AR 22-23.) The fact that Dr. Noll reflected in April 2005 that plaintiff "*continues* to suffer with a very low frustration tolerance and stress tolerance,"

therefore, does not undermine the ALJ's decision.[3] (AR 436.) Additionally, it should be noted that, despite opining as to plaintiff's inability to work, Dr. Noll noted *greater* functionality as related to certain medications and "modest *improvements* in mood and energy level." ( *Id.* (emphasis added.))

Moreover, the ALJ's conclusion as to plaintiff's limitations reflects general acceptance of the opinions of the state agency physicians and differs from Dr. Noll's April 2005 finding that plaintiff met the criteria for Listing 12.04. (*See* AR 23 ("I generally agree with the State Agency physicians concerning [plaintiff's] mental limitations, but note that the record does support that the claimant has frequently reported problems with anger, so he probably should not work closely with others or the general public."), AR 246 (state agency physicians assessed moderate difficulties in maintaining concentration, persistence, and pace and mild difficulties in maintaining social functioning), and AR 443 (Dr. Noll found plaintiff met the criteria for Listing 12.04 in that he had marked limitations in maintaining social functioning and in concentration, persistence, and pace.)) The mere fact that Dr. Noll for the first time opined that plaintiff met the criteria for Listing 12.04 does not warrant remand. If that were the case, a plaintiff would need only submit a report including a previously unstated opinion to the Appeals Council in order to obtain further review. Instead, it can be said that, here, there is substantial evidence to support the ALJ's decision even taking Dr. Noll's April 2005 report into consideration. At the same time, because the undersigned finds further administrative proceedings necessary in this matter for a different

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[3] Given this statement as to plaintiff's "continu[ing]" problems (AR 436), the Commissioner's argument that Dr. Noll's April 2005 report relates solely to a different time period is not persuasive.

reason, as discussed below, the ALJ should also take the opportunity to specifically address Dr. Noll's April 2005 report.

Credibility Assessment

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony unreliable, an ALJ must render a credibility determination with sufficiently specific findings, supported by substantial evidence. "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834. "We require the ALJ to build an accurate and logical bridge from the evidence to her conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings." *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

In this case, the ALJ rendered the following credibility assessment:

> I do not find the claimant particularly credible. He said that he had back pain that prevented him from doing work and that panic attacks and anxiety would prevent him from working. He said that when he was really anxious, he stayed home. The evidence shows that much of the claimant's anxiety is related to his family and his neighbors, and that he tends to leave home as a way to diffuse his anger and anxiety. The claimant testified that he only mowed the lawn twice a month and that this caused severe pain, but the record shows that in the summer of 2004, he was planning on building onto his garage, he was working three hours a day in the yard, he worked in the yard instead of walking. He injured his thumb on two different occasions this

> summer while he was working on cars. He was also active in 2002, reporting that he was very active in August of 2002. He first mentioned back pain to his treating doctor in August of 2004. The claimant said that he had partial panic attacks several times a week, but in April of 2004, he denied any significant panic for a few weeks. The claimant admitted to no full panic attack since 2002.

(AR 22.)

Plaintiff asserts that the ALJ failed to provide clear and convincing reasons for rejecting his testimony, failed to identify what specific testimony was not credible and how this evidence undermines his other complaints, and inaccurately paraphrased the record. With respect to the latter, plaintiff goes into specific detail regarding his back pain, anxiety, and home projects. (*See* Dkt. 13 at 18-21.)

Plaintiff also contends the ALJ failed to address his pain with the specificity required by Social Security Ruling (SSR) 96-7p. That ruling indicates, *inter alia*, that it is not sufficient for the ALJ "to make a single, conclusory statement that 'the individual's allegations have been considered' or that 'the allegations are (or are not) credible[,]'" and that the "decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific[.]" SSR 96-7p. Plaintiff asserts that, rather than identifying which pain complaints were not credible, the ALJ in this case merely stated when performing the RFC assessment that he must consider plaintiff's pain and then construed the record to reflect an individual more physically and socially active than attested to by plaintiff.

Contrary to plaintiff's contention, the ALJ did target specific testimony for criticism. For example, the ALJ contrasted plaintiff's testimony regarding his back pain with the fact that he only first complained about back pain to his treating physician in August 2004, as well as evidence in the record demonstrating plaintiff's physical activity. This discussion evidenced the ALJ's

consideration of plaintiff's pain. The ALJ also found an inconsistency between plaintiff's testimony regarding panic attacks and other evidence in the record. The ALJ appropriately addressed these perceived inconsistencies in rendering his credibility assessment. *See Light*, 119 F.3d at 792. Also, while plaintiff may disagree with the ALJ's interpretation of the evidence in the record, he fails to show that the ALJ's interpretation was not rational. *See Thomas*, 278 F.3d at 954. For these reasons, plaintiff fails to demonstrate any error in the ALJ's credibility assessment.

Lay Witness Statement

Lay witness testimony as to a claimant's symptoms or how an impairment affects ability to work is competent evidence. *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The ALJ can reject the testimony of lay witnesses only upon giving reasons germane to each witness. *See Smolen v. Chater*, 80 F.3d 1273, 1288-89 (9th Cir. 1996) (finding rejection of testimony of family members because, *inter alia*, they were "'understandably advocates, and biased'" amounted to "wholesale dismissal of the testimony of all the witnesses as a group and therefore [did] not qualify as a reason germane to each individual who testified.") (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)). *Accord Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) ("[L]ay testimony as to a claimant's symptoms is competent evidence that an ALJ must take into account, unless he or she expressly determines to disregard such testimony and gives reasons germane to each witness for doing so.")

Plaintiff asserts that the ALJ erred in disregarding the lay witness statement of his sister without comment. In a September 2002 questionnaire, Elizabeth Ramel attested to, *inter alia*, plaintiff's problems with anxiety, depression, mood swings, violent outbursts, attention, memory,

handling changes in his daily routine, arguing, fear or suspicion/paranoia, and patience. (*See* AR 143-47.) She described plaintiff's relationship with former employers, supervisors, and coworkers as "[f]rustrating, threatening, paranoid, and known to argue with supervisors[,]" and recounted his loss of a job after an incident in which he became angry and yelled at his supervisor. (AR 144.) Ms. Ramel added:

> He seems to have trouble with anxiety and anger, which has resulted in domestic violence with me and ended up with him going to jail. His moods seem to change constantly and I don't know what to expect. Since his head injury, he has been harder to live around. I wish his condition would improve. Some days I walk "on eggshells" and keep a packed suitcase handy. He is my only brother and I can't help wanting what is best for him.
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> (AR 147.)

Although conceding that the ALJ did not address Ms. Ramel's questionnaire, the Commissioner argues that the ALJ's findings are consistent with her statements in that the ALJ found plaintiff had a moderate limitation in concentration, persistence, and pace and could tolerate only occasional contact with coworkers and the public. The Commissioner asserts that, given this consistency, the ALJ's failure to address the questionnaire is harmless. *See Batson v. Commissioner of the Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (applying harmless error standard to assumption made by ALJ).

As noted by plaintiff in his reply, the consistency pointed to by the Commissioner does not account for the totality of Ms. Ramel's statement. It does not address, for example, her testimony that plaintiff was prone to violent outbursts. The ALJ did elsewhere account for some of Ms. Ramel's testimony, including that related to a charge of domestic violence:

> He is able to take care of his activities of daily living. The record indicates that he

> does household chores, he takes care of himself and he does his own shopping. I find that the claimant has mild limitations in his activites of daily living. The claimant has some anger problems. He has been charged with domestic violence, but that was prior to his seeking counseling. The record shows that he has had to develop methods of coping with anger, but he has not acted out on his anger. He is able to attend church and a men's group at church, but is otherwise isolated except for family. I find that he has moderate limitations in social functioning. In concentration, persistence or pace, he does have attention deficit disorder, and has problems with extended concentration, but he is able to finish household tasks. He has said that he reads to help relieve his anxiety. I find that he has moderate limitations in concentration, persistence or pace. This is no evidence of an episode of decompensation of extended duration. He is able to function outside his home and he does not decompensate with slight increases in stress.

(AR 22.) The ALJ also further concluded "that the record does support that the claimant has frequently reported problems with anger, so he probably should not work closely with others or the general public." (AR 23.)

However, the Commissioner's harmless error argument nonetheless fails. The Ninth Circuit recently articulated the following standard for cases in which an ALJ fails to discuss lay testimony: "[W]here the ALJ's error lies in a failure to properly discuss competent lay testimony favorable to the claimant, a reviewing court cannot consider the error harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination." *Stout v. Commissioner, Soc. Sec. Admin.*, ___ F.3d ___, No. 04-36006, 2006 U.S. App. LEXIS 18578, at *15-16 (9th Cir. July 25, 2006). In this case, it cannot be said that no reasonable ALJ, upon fully crediting the testimony of Ms. Ramel as described above, would have reached a different disability determination.

Plaintiff requests that the opinions of his sister be credited as a matter of law. Crediting an opinion as a matter of law is appropriate when, taking that opinion as true, the evidence supports a finding of disability. *See*, *e.g.*, *Schneider v. Commissioner of Soc. Sec. Admin.,* 223

F.3d 968, 976 (9th Cir. 2000) ("When the lay evidence that the ALJ rejected is given the effect required by the federal regulations, it becomes clear that the severity of [plaintiff's] functional limitations is sufficient to meet or equal [a listing.]"); *Lester*, 81 F.3d at 830-34 (finding that, if doctors' opinions and plaintiff's testimony were credited as true, plaintiff's condition met a listing) (quoting *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir. 1989)); *Smolen*, 80 F.3d at 1292 (ALJ's reasoning for rejecting subjective symptom testimony, physicians' opinions, and lay testimony legally insufficient; finding record fully developed and disability finding clearly required). However, courts retain flexibility in applying this "'crediting as true' theory." *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further determinations where there were insufficient findings as to whether plaintiff's testimony should be credited as true). As stated by one district court: "In some cases, automatic reversal would bestow a benefits windfall upon an undeserving, able claimant." *Barbato v. Commissioner of Soc. Sec. Admin.*, 923 F. Supp. 1273, 1278 (C.D. Cal. 1996) (remanding for further proceedings where the ALJ made a good faith error, in that some of his stated reasons for rejecting a physician's opinion were legally insufficient).

The record in this case does not support a finding of disability even taking the testimony of Ms. Ramel as true. As such, this matter should be remanded for further administrative proceedings to allow the ALJ to address Ms. Ramel's questionnaire.

Step Five

In his briefing, plaintiff argued that, given the above described errors, the ALJ failed to meet his burden at step five. To the extent required by the reconsideration of lay testimony, the ALJ should reassess the remaining steps of the five-step process.

Also, in oral argument, plaintiff raised a new step five argument, asserting that the ALJ never discussed the assessed moderate limitation on concentration, persistence, and pace with the vocational expert, describing instead a limitation to "simple, routine" tasks. (AR 76.) The Court need not address arguments raised for the first time in oral argument. However, because this matter is deemed appropriate for remand on another ground, and for the reasons described below, the undersigned will address this new argument.

A hypothetical posed to a vocational expert must include all of the claimant's functional limitations supported by the record. *Thomas*, 278 F.3d at 956 (citing *Flores v. Shalala*, 49 F.3d 562, 520-71 (9th Cir. 1995)). A vocational expert's testimony based on an incomplete hypothetical lacks evidentiary value to support a finding that a claimant can perform jobs in the national economy. *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993) (citing *DeLorme v. Sullivan*, 924 F.2d 841, 850 (9th Cir. 1991)).

Here, as noted by plaintiff in oral argument, although the ALJ referred to a document containing the concentration, persistence, and pace limitation in posing his hypothetical question, the vocational expert indicated he was not in possession of that document. (*See* AR 50 (referring to exhibits, the vocational expert indicated he had the "E's not the F's" and ALJ Bauer subsequently referred to "Exhibit 3F, 11" as supporting the limitation to simple, routine tasks) and AR 246 (exhibit 3F11 indicates moderate difficulties in concentration, persistence, or pace.)) Therefore, the vocational expert responded solely with respect to an individual limited to simple, routine tasks. As such, it can be said that the hypothetical posed to the vocational expert did not adequately include all of plaintiff's functional limitations. *Compare Thomas*, 278 F.3d at 956 (ALJ failed to include a concentration, persistence and pace limitation in a hypothetical to a vocational

expert, but instructed the vocational expert to credit the preceding testimony of a physician who specifically testified to such a limitation and provided a copy of the exhibits presented in the hearing; "This case is not one where the [vocational expert (VE)] was presented with a voluminous conflicting record, requiring the VE to remember numerous premutations of varying limitations. Rather, the ALJ directed the VE to credit fully a specific portion of the record, which the VE had just heard. As a result, the ALJ's hypothetical adequately incorporated Ms. Thomas' limitation of concentration, persistence and pace."), *with Newton v. Chater*, 92 F.3d 688, 695 (8th Cir. 1996) (finding of deficiencies of concentration, persistence, or pace was not adequately presented where ALJ's hypothetical limited the claimant to simple jobs). On remand, the ALJ should compose a complete hypothetical to the vocational expert, including any limitations on concentration, persistence, or pace.

**CONCLUSION**

This matter should be REMANDED for further administrative proceedings consistent with the above discussion. A proposed order accompanies this Report and Recommendation.

DATED this 3rd day of August, 2006.

Mary Alice Theiler
United States Magistrate Judge